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The Fair Credit Reporting Act

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Note: The Fair Credit Reporting Act

Businesses that extend credit, sell insurance or offer employment often attempt to minimize the risk of dealing with strangers by purchasing information about them from agencies which compile dossiers on individuals containing information about their credit rating and personal lives. This practice presents two problems for the consumer. First, unauthorized disclosure of the sometimes highly personal information in these files poses a threat to individual privacy. Second, inaccurate information in the files may result in a denial of credit, insurance or employment. Given this potential for harm and abuse, it seems extraordinary that the information reporting industry was virtually unregulated until April, 1971, when the Fair Credit Reporting Act (FCRA) became effective.¹ This note will describe the information reporting industry and the consumer problems created by it, analyze the FCRA to evaluate how it deals with these problems and suggest several interpretative rulings and amendments to the Act that could improve its already substantial consumer protection without great expense or major departures from its present design.

I. THE INDUSTRY AND ITS PRODUCT

Within the information reporting industry there are two distinct types of reporting agencies that Congress sought to regulate through the FCRA.² The first is the retail credit bureau

1. Fair Credit Reporting Act [hereinafter FCRA or the Act], 15 U.S.C. §§ 1681-1681t (1970). Prior to the FCRA only Oklahoma regulated the reporting industry to a significant extent. OKLA. STAT. ANN. tit. 24, §§ 81-85 (1971). Other states have recently moved to regulate the industry. ARIZ. REV. STAT. ANN. §§ 44-1691 to 1696 (Supp. 1971); CAL. CIV. CODE tit. 1.5, §§ 1750-57 (West Supp. 1972); MASS. GEN. LAWS ANN. ch. 93, §§ 50-65 (Supp. 1971); N.M. STAT. ANN. §§ 50-18-1 to 18-8 (Supp. 1971); N.Y. GEN. BUS. LAW §§ 370-376 (McKinney Supp. 1971). For a comparison of certain state requirements and the requirements of the FCRA, see notes 78 and 129 *infra*.

2. While the FCRA is aimed primarily at commercial agencies, it does regulate non-profit agencies as well. See FCRA § 1681a(f). Among these are non-profit organizations which assemble blacklists of their political enemies and circulate these to employers with the aim of denying employment to all such persons. During hearings in the House, concern was voiced about the activities of the Church League of America, an ultra-rightwing group that offers employers lists of "radicals, socialists, revolutionaries, communists, and troublemakers of all sorts."

or consumer credit reporting service which furnishes information on the credit-worthiness of individuals to credit-grantors.³ The second of these institutions is investigatory in nature and prepares very comprehensive dossiers on the personal lives of individuals for insurance companies or prospective employers. The credit bureaus tend to be small businesses serving only one community or area, but there are a few national credit agencies holding computerized files on millions of consumers.⁴ Even the small local credit bureaus have access to millions of files through a nationwide cooperative information exchange maintained by their trade association, Associated Credit Bureaus of America.⁵ The investigatory agencies are generally large national operations with offices in many cities and large staffs of investigators.⁶ It has been estimated that in the combined files of all the credit and investigatory agencies dossiers exist on over 100 million consumers.⁷

The two types of information reporting agencies supply different kinds of information. Credit bureau reports are generally limited to a credit history of the individual which consists of information on existing credit obligations and payment performance as well as public record information concerning arrests, indictments, suits, liens, outstanding judgments, marriage and divorces.⁸ The reports available from the investigatory agencies are much more comprehensive and include a great deal of information about the subject's personal life. An investigatory report gathered for insurance purposes may include information on the subject's drinking habits, morals, hobbies and even the tidiness of his yard and home.⁹ Comments from neighbors and acquaintances about the subject are also included

Hearings on H.R. 16340 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 65 (1970) [hereinafter cited as *House Hearings*].

3. The retail credit bureaus are distinguished from the mercantile agencies that supply information regarding businesses. The most familiar of the mercantile agencies is Dun and Bradstreet, Inc.

4. One of the largest, TRW Credit Data, has computerized files on 37,000,000 Americans. *House Hearings*, *supra* note 2, at 165.

5. *Id.* at 72. ACB claims to have some 2,100 members.

6. The largest, Retail Credit Company of Atlanta, employs 7000 investigators. *Id.* at 628.

7. Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837, 839 (1971).

8. *Hearings on S. 823 before the Subcomm. on Financial Institutions of the Senate Banking and Currency Comm.*, 91st Cong., 1st Sess. 91 (1969) [hereinafter cited as *Senate Hearings*].

9. *Id.* at 278-87.

in investigatory reports.¹⁰

The information purchased from these agencies is not always reliable. The most fertile source of inaccuracies is public record information.¹¹ Such information is difficult to keep current because official records often do not record the final disposition of legal matters, or the filing of final dispositions may be unavailable for inspection because of inadequate judicial recording systems.¹² In addition to the problems inherent in recording from public records, the agencies frequently make reporting errors by confusing records of people with the same name.¹³

A second source of inaccurate information is personal interviews with neighbors or other persons concerning the subject's personal life. These interviews in many cases provide information which is nothing more than gossip, and often no attempt is made to determine the reliability of such information.¹⁴ The heavy workload of many investigators virtually precludes careful gathering and verification of consumer information.¹⁵ Moreover, the format of the report does not distinguish gossip from more reliable information and thus may encourage the acceptance of gossip as fact.

II. CONSUMER PROBLEMS PRIOR TO THE FCRA

Prior to the FCRA the individual harmed by false or inaccurate information reported by a credit bureau or investigatory agency or by unauthorized disclosure of private information in his dossier was generally unable to recover his losses. The agency's duties to the consumer were very limited, and few legal theories were helpful in obtaining a judgment against it.¹⁶

Moreover, reporting agencies were not required to notify the consumer that a report on him existed or was being supplied to a third party. Neither was there a duty on the user of a report to notify the subject if the report were the basis for a denial of credit or other benefit. Many agencies contractually prohibited the user from disclosing the source of its consumer

10. *House Hearings, supra* note 2, at 186.

11. A governor's task force arrived at this conclusion after studying the problems of the consumer reporting industry in California. *Id.* at 130.

12. *Id.*

13. *Id.*

14. *Senate Hearings, supra* note 8, at 399.

15. *Id.*

16. See text accompanying notes 24-26 and 33-35 *infra*.

reports, and some agencies further required that the user agree not to disclose that it was using consumer reports.¹⁷ This secrecy resulted in some individuals being denied employment or other benefits over a period of years without knowledge of the source of their difficulties.¹⁸ Even if an individual learned of the existence of a file and requested that the agency disclose the information it was reporting to third parties, the agency was under no legal obligation to comply. Some agencies made it a formal policy never to discuss with the subject information contained in his file.¹⁹

Even if the reporting agency disclosed to the subject the contents of its report, additional problems existed. Agencies willing to delete false or misleading information balked at sending the amended report to all who had previously used the erroneous report.²⁰ Another common problem involved disputed claims. A credit report might show that a consumer had not paid for an item but not report that the bill went unpaid because the merchandise was defective and the merchant refused to repair it.²¹ Prior to the FCRA a consumer could not require the reporting agency to note on his report that a debt was disputed or an explanation of his nonpayment. This lack of a right to comment on disputed claims or information was especially serious when reports used by employers and insurers contained hearsay, gossip or unverified comments about the subject's personal life. Not only were agencies under no duty to permit the subject of the report to reply to such comments, but they generally refused even to reveal the source of the disputed information.²² Thus one victimized by false and malicious information in such a case was wholly unable to discover who his accusers were, much less reply to them.

A further problem involved the reporting of accurate but outdated information. Adverse information from the distant past is a poor measure of current credit-worthiness or reliability,

17. *Senate Hearings, supra* note 8, at 189.

18. One salesman was unable to learn what was blocking advancement in his career for over five years. Only after a friend ignored a contract obligation of secrecy with the investigatory agency supplying pre-employment reports did the salesman learn that he was unable to hold a good job because of an erroneous report that, among other things, he had been dishonorably discharged from military service. *House Hearings, supra* note 2, at 78-81.

19. *Senate Hearings, supra* note 8, at 185.

20. *House Hearings, supra* note 2, at 81.

21. *Senate Hearings, supra* note 8, at 93.

22. *Id.* at 185.

but in many cases such information was on file and reported.²³ Since the information was factual, there was little the subject of the report could do, there being no obligation on the reporting agency to discard possibly obsolete information.

Aggravating this situation was the inability of a person injured by a false or misleading report to recover damages in a defamation action. Virtually every jurisdiction recognized the doctrine that reports furnished in good faith to parties having a legitimate interest in the information reported possess a qualified privilege which is not lost simply because the report contains some inaccurate or defamatory matter.²⁴ The consumer injured by such a report could defeat the privilege only by showing that the report had been furnished out of malice or supplied to persons with no legitimate interest in the information.²⁵ Since these facts were usually absent, the agencies were effectively insulated from liability for defamation.²⁶

Threats to an individual's privacy also existed because the confidentiality of these highly personal dossiers was often not adequately safeguarded. While the stated policy of most firms was to furnish information only to those who had a legitimate business reason for requesting the information,²⁷ the firms did not utilize effective procedures to prevent those with other mo-

23. *Id.* at 431-32.

24. See, e.g., *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir. 1952), cert. denied, 344 U.S. 821 (1952). For an exhaustive listing of those jurisdictions that have considered the question and extended the privilege, see Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1050 nn. 86 & 87 (1971). See also Smith, *Conditional Privilege for Mercantile Agencies—MacIntosh v. Dun*, 14 COLUM. L. REV. 187 (1914).

In the United States, only Georgia and Idaho have withheld the privilege. *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886); *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914). The privilege has been rejected in England. *MacIntosh v. Dun* [1908] A.C. 300 (P.C.).

25. See, e.g., *Watwood v. Stone's Mercantile Agency*, 194 F.2d 160 (D.C. Cir. 1952).

This is a broad statement of possible abuses that would defeat the conditional privilege. For a more detailed treatment, see W. PROSSER, *THE LAW OF TORTS* 819-33 (4th ed. 1971).

26. One commentator has suggested that plaintiffs would have a better chance of recovery for injuries resulting from false or defamatory statements if they employed a products liability theory rather than the defamation theory. Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035, 1054-61 (1971).

27. This policy is formulated in the Associated Credit Bureaus' Guidelines for Protection of Privacy. *Senate Hearings*, supra note 8, at 143. Acceptance of the Guidelines is a condition of membership in the ACB. *Id.* at 146.

tives from gaining access to the files.²⁸ For example, many firms allowed local police, as well as the F.B.I. and the Internal Revenue Service, to use their files as an aid in law enforcement.²⁹ Some agencies sold mailing lists of their best credit risks³⁰ and distributed "preventative bulletins" on delinquents.³¹ Also, some politicians obtained credit bureau dossiers on their opponents in the hope of discovering damaging information that could be used against them in election campaigns.³²

Though such practices threatened the individual's right of privacy, established legal doctrines generally foreclosed recovery on an invasion of privacy theory. Where information about an individual's private life has not been widely disseminated, several jurisdictions have held that there is no invasion of privacy.³³ Furthermore, an action for invasion of privacy has been subject to the conditional privilege that makes recovery in defamation so difficult.³⁴ If the user of the files has a legitimate interest in the information, the communication to him of even highly personal information has been privileged.³⁵

28. CBS News tested the security measures of the agencies in a much-publicized experiment. CBS established a fictitious business unit, Transitair Systems, which consisted of nothing more than a mailing address, a telephone answering service and some letterhead stationery. Transitair sent requests for credit reports on certain individuals to 20 credit bureaus in different parts of the country. Despite the statement of an industry spokesman to CBS that it is impossible for unauthorized parties to gain access to credit reports, 10 of the 20 credit bureaus Transitair (CBS) contacted sent credit reports. Other credit bureaus offered to supply information if Transitair would sign a contract. Only two of the 20 bureaus referred Transitair to a New York credit bureau for a check of credentials, the approved practice under the industry guidelines. *House Hearings, supra* note 2, at 59-61.

29. *Senate Hearings, supra* note 8, at 149, 161.

30. *House Hearings, supra* note 2, at 36-37.

31. The American Hotel and Motel Association was concerned that the FCRA would interfere with the practice of distributing "protective bulletins" of skippers, con men, and bad check artists. *Id.* at 614. Such bulletins are permissible under Interpretation II, Federal Trade Commission Proposed Interpretations under Fair Credit Reporting Act, 37 Fed. Reg. 4983 (1972) (announced March 8, 1972; effective May 8, 1972). Distribution of lists of bad credit risks as opposed to lists of those who have violated criminal laws is not permitted. *Id.* For the status of such an interpretation, see note 47 *infra*.

32. *House Hearings, supra* note 2, at 209.

33. *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862 (1962); *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943).

34. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216 (1890).

35. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966); see Note, *Credit Investigations and the Right to Privacy: Quest for a Remedy*, 57 GEO. L.J. 509, 523-27 (1969).

III. CONSUMER PROTECTION UNDER THE FCRA

The stated purpose of the FCRA is to ensure that information supplied by reporting agencies is furnished in a manner "which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"³⁶ To accomplish this purpose the Act

- (1) Requires that the agencies follow reasonable procedures to assure the maximum possible accuracy of the information they report;³⁷
- (2) Requires that the consumer be notified when a consumer report is the basis of a decision to deny credit or another benefit;³⁸
- (3) Grants the consumer the right to learn what is in his file;³⁹
- (4) Requires that inaccurate information be deleted from a file and disputed information be reported as such with a statement of the consumer's side of the dispute;⁴⁰
- (5) Requires that obsolete information be removed from consumer reports;⁴¹
- (6) Requires advance notice and other special measures of protection when a report will involve interviews with friends and others concerning the subject's personal life;⁴²
- (7) Prohibits furnishing a consumer report except with the consumer's permission or for specified legitimate purposes;⁴³
- (8) Provides a private cause of action for non-compliance with the requirements of the act and criminal penalties for certain violations of the act.⁴⁴

The administrative agency primarily responsible for enforcement of the Act is the Federal Trade Commission;⁴⁵ viola-

36. FCRA § 1681(b).

37. FCRA § 1681e(b).

38. FCRA § 1681m(a).

39. FCRA § 1681g.

40. FCRA § 1681i.

41. FCRA § 1681c.

42. FCRA § 1681d.

43. FCRA § 1681b.

44. FCRA §§ 1681o, q, & r.

45. FCRA § 1681s(a). The following agencies have enforcement obligations in the cases specified in FCRA § 1681s(b): the Comptroller

tion of the FCRA is an unfair trade practice under Section 5(a) of the Federal Trade Commission Act.⁴⁶ Since the Federal Trade Commission was not granted rule-making authority under the FCRA, its interpretations of the compliance obligations of the industry under the Act constitute only advisory opinions.⁴⁷ However, the Commission may initiate corrective action for failure to comply with the Act as interpreted in these advisory opinions.⁴⁸

A. SCOPE OF THE FCRA

Compliance with the FCRA is mandatory for those who supply and use "consumer reports." A "consumer report" is defined as

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under Sections 1681b⁴⁹

of the Currency, Federal Reserve Board, Board of Directors of the Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Administrator of the National Credit Union Administration, Interstate Commerce Commission, Civil Aeronautics Board and the Secretary of Agriculture.

46. FCRA § 1681s(a).

47. There are two sources of such advisory opinions. First, interpretations of the Fair Credit Reporting Act are published in the *Federal Register*. Such interpretations are not substantive rules and do not have the force of law. They are advisory in nature and comparable to "industry guides," representing "the Commission's view" of how the FCRA should be interpreted and what it requires. FTC Procedures and Rules of Practice, Subpart H, § 1.73, 36 Fed. Reg. 9294 (1971). Second, staff interpretations are issued in response to individual requests for guidance. These represent "informal staff opinion" rather than "the Commission's view" (*id.* at § 1.72), but it is uncertain that any practical consequences turn on this difference. A large number of these staff interpretations rendered in the period from November, 1970, to April, 1971, have been codified in a pamphlet titled "Compliance with the Fair Credit Reporting Act." The pamphlet is reprinted at 4 CCH CONSUMER CREDIT GUIDE ¶ 11,301 (1971).

48. The Federal Trade Commission has issued this warning only with respect to Interpretations published in the Federal Register (FTC Procedures and Rules of Practice, Subpart H, § 1.73, 36 Fed. Reg. 9294 (1971)), but presumably the Commission might initiate corrective action if a staff interpretation were ignored. See note 47 *supra* for the distinction between Interpretations published in the Federal Register and staff interpretations.

49. FCRA § 1681a(d).

It should be noted that a report need not be derogatory to fall within this definition. It is sufficient that the report contains information relating to the subjects listed in the definition and that the information is collected or used for one of the purposes specified. A major limitation on the scope of the Act is created by excluding from the definition any credit or insurance report sought for business rather than personal or family purposes.⁵⁰

Certain reports that meet the definitional requirements of a "consumer report" are expressly excluded by the statute,⁵¹ the most important exclusion being reports of "trade experience" or "ledger experience." A report containing information "solely as to transactions or experiences between the consumer and the person making the report" is not considered a "consumer report" subject to the FCRA.⁵² For example, if merchant A asks merchant B for information on consumer C, the reporting by B of his credit experience with C is not a consumer report. However, if B goes beyond his own trade experience and relates information about C's dealings with other merchants or creditors, his report constitutes a consumer report subject to the FCRA.⁵³ Exclusion of "trade information" reports from FCRA regulation is premised on the belief that a report based solely on a merchant's personal experience with a consumer is likely to be reliable.⁵⁴

50. It is clear that the Act does not apply to reports used to establish eligibility for business credit or business insurance. *Senate Hearings*, *supra* note 8, at 16-17; FTC Advisory Opinion, 4 CCH CONSUMER CREDIT GUIDE ¶ 11,314 at 59,811-12 (1971) (Question 3). Cf. *Anonymous v. Dun & Bradstreet, Inc.*, 40 U.S.L.W. 2162 (N.Y. Sup. Ct., Sept. 14, 1971), which held that although the FCRA's ban on reporting obsolete information (FCRA § 1681c) applies only to credit reports on individuals, the public policy embodied in the Act warranted an injunction against publication of a 24-year-old criminal conviction in a credit report on a corporation solely owned by the individual who had been convicted.

51. FCRA § 1681a(d) (A)-(C).

52. FCRA § 1681a(d) (A).

53. FTC Advisory Opinion, 4 CCH CONSUMER CREDIT GUIDE ¶ 11,312, at 59,804 (1971).

54. See *Senate Hearings*, *supra* note 8, at 62 (explanation of a similar exclusion in a proposed New York statute regulating credit reporting agencies).

There are two other exclusions from the definition of "consumer report." An authorization of a specific extension of credit by an issuer of a credit card is not a "consumer report" subject to the FCRA. FCRA § 1681a(d) (B). Also, when a third party requests a prospective creditor to advance credit to a consumer, the creditor's report is not a "consumer report" that creates disclosure obligations for the third party

The scope of the FCRA is further restricted by the fact that only "consumer reporting agencies" are subject to the Act.⁵⁵ A "consumer reporting agency" is defined as a person or agency that gathers information for the purpose of furnishing consumer reports to third parties.⁵⁶ Department stores and other large-scale grantors of credit maintain extensive credit information files and many initiate credit investigations, but this information is exclusively for their own use and is not furnished to third parties. Thus they are not "consumer reporting agencies" and their reports are not "consumer reports" subject to the Act.⁵⁷ However, these businesses are subject to certain requirements of the Act if they purchase and use consumer reports prepared by others.⁵⁸

B. REQUIREMENT OF REASONABLE PROCEDURES TO ENSURE ACCURACY

Agencies subject to the FCRA are required to follow "reasonable procedures" to assure "maximum possible accuracy" of the information furnished in consumer reports.⁵⁹ The Act itself does not specify the precise procedures agencies should employ to comply with this requirement, but the FTC has published an advisory opinion interpreting this requirement.⁶⁰ The FTC states that agencies can no longer require quotas of adverse information from investigators since this practice seems inconsistent with "maximum possible accuracy." Verification of adverse information by more than one source is recommended to improve accuracy. Agencies are also urged to periodically re-

so long as the consumer is given the name and address of the prospective creditor and the prospective credit makes the required disclosures upon use of such reports. FCRA § 1681a(d)(C).

The rationale for excluding the middleman in these transactions—the merchant who checks the credit card with the issuer and the third party who puts a consumer in touch with a lender—seems to be that he acts only as a conduit; he does not make the decision to extend credit but merely puts the consumer in touch with a party who might do so. Since the middleman does not make decisions affecting the consumer, he is not obligated to comply with the Act in such transactions. For the source of the "conduit" analysis, see *Senate Hearings*, *supra* note 8, at 62 (explanation of similar exclusions in a proposed New York statute regulating credit reporting agencies).

55. FCRA § 1681a(d).

56. FCRA § 1681a(f).

57. FTC Advisory Opinion, 4 CCH CONSUMER CREDIT GUIDE ¶ 11,311, at 59,803 (1971).

58. See text accompanying note 61 *infra*.

59. FCRA § 1681e(b).

60. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,306 at 59,790 to 91 (1971).

evaluate information on file to determine whether or not it has become obsolete or misleading. The agencies are further advised to indicate on the report the purpose for which information was originally gathered in order to minimize the risk of inaccurate interpretation when used subsequently for a different purpose. Special care must be taken by those agencies which use automatic data processing equipment and mechanical data transmitters to prevent errors caused by equipment malfunction.

C. THE NOTICE REQUIREMENT

The FCRA imposes a notice obligation on the *user* of consumer reports. If adverse action on a consumer's application for credit, insurance, employment or another benefit is based in whole or in part on a consumer report, the user of the report must so notify the consumer and disclose the name and address of the agency that supplied the report.⁶¹ This notice requirement should greatly aid persons victimized by inaccurate consumer reports of which they would otherwise have no knowledge, who prior to the FCRA might have been denied employment or other benefits without explanation over a period of years because of such reports.⁶²

However, there is a serious loophole in this notice requirement. The obligation to give notice would not arise where the user merely orders a report, reads it, but then makes his adverse decision on other grounds such as an application form completed by the consumer. Thus users who wish to avoid the trouble and expense of notifying a consumer as required could claim their adverse decisions were based on factors independent of the consumer reports.⁶³ This simple technique for avoiding the notice requirement poses a serious threat to consumers because notice is a prerequisite to adequate protection of their rights under the FCRA. Only when the consumer has notice that his file exists will he be able to exercise his rights to learn the contents of his file and have inaccuracies corrected.⁶⁴

This loophole in the notice requirement could be eliminated

61. FCRA § 1681m(a).

62. See note 18 *supra*.

63. The obligation to notify arises when an adverse decision is based "wholly or partly" on a consumer report. FCRA § 1681m(a). This claim by the user would therefore be an assertion that his decision was not even "partly" based on the report.

64. FCRA §§ 1681g & i.

in either of two ways. First, the Act could be amended to provide that where a report has been ordered and there is a decision adverse to the subject of the report, the user must notify the consumer of the report whether or not it was the basis of the adverse decision. A second and simpler method of dealing with this problem would be to place upon the user, in unfair trade practice proceedings against him, the burden of proving that he did not rely on consumer reports in making his decisions.⁶⁵ A formal announcement of this policy by the FTC would discourage circumvention of the notice requirement and encourage report-users to send notices in more cases. This would not be unduly burdensome since the user's only obligation would be to notify the consumer of the name and address of the agency supplying the report;⁶⁶ he would not be subject to the agency's obligation to reinvestigate disputed items and correct inaccuracies.⁶⁷

However, even compliance with the literal terms of the Act's notice requirement appears insufficient. Although such compliance would inform the consumer of the name and address of the agency which supplied his report, the Act does not require the user to advise the consumer of his right to discover the contents of his file and correct inaccuracies. The sample notification forms the FTC has published with its advisory opinions do include a statement advising the consumer of his rights,⁶⁸ and presumably, failure to so inform the consumer in this notification could result in corrective action by the FTC.⁶⁹

65. The burden on the user of reports could be a burden of going forward with evidence or a burden of proof or persuasion. Authority for imposing on the user a burden of going forward can be found in FCRA § 1681s(a), which grants the FTC power to issue "procedural rules" in enforcing compliance with the Act. Also, the power to impose this procedural burden arguably is inherent in the grant of adjudicatory power to the FTC. The FTC's authority to place the burden of proof or persuasion on the report-user who engages in the practice of ordering reports but not notifying consumers is suggested by an examination of the FTC's use of "trade regulation rules," 16 C.F.R. § 1.12 (1972). If a trade regulation rule is relevant to an issue in an adjudication, the Commission may rely on it to settle the issue, provided only that the respondent must be given a hearing on the applicability of the rule. 16 C.F.R. § 1.12(c) (1972). This suggests that the Commission has the power to absolutely foreclose an argument on the merits on certain issues; *a fortiori* the Commission could place the burden of proof on respondent.

66. See FCRA § 1681m(a).

67. FCRA § 1681i.

68. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,319 (1971).

69. See note 48 *supra*.

D. CONSUMER'S RIGHT TO ACCESS TO HIS FILE

The consumer has the right to learn the "nature and substance" of all information in his file.⁷⁰ The reporting agency must also disclose the sources of the information, although there are some limitations on this requirement where "investigative consumer reports" are concerned.⁷¹ Finally, the reporting agency must disclose to whom it has supplied the report in the preceding six months, or in the preceding two years if employment was concerned.⁷² Given access to his file, the consumer can determine if there are inaccuracies, the cause of any inaccuracy and the extent to which the inaccurate information has circulated and harmed him. This information is necessary to the consumer's effort to repair the damage that an erroneous report may have caused. Prior to the FCRA the right to discover such information was not generally recognized.

The FCRA provides that the consumer must give "reasonable notice" to the agency if he desires an interview concerning his files,⁷³ but the FTC has advised that this requirement should not be used as an excuse to make it difficult for the consumer to exercise his rights.⁷⁴ Nevertheless, some agencies continue to discourage consumers who seek access to their files despite the clear requirement of the FCRA.⁷⁵ Common tactics are to inform the consumer that his file is in another office for processing or that the employee who handles disclosures is on vacation. The consumer is told to come back later if he wants to see his file. These tactics clearly are in conflict with the FTC's interpretation of the requirements of the Act and could result in the initiation of corrective action by the FTC.⁷⁶

70. FCRA § 1681g(a)(1). The "nature and substance" language was used to indicate that the consumer does not have a right to possess or read the actual file. Consumers were denied this right because the industry feared consumers would try to destroy their files if they could possess the actual file. *House Hearings*, *supra* note 2, at 145. The "nature and substance" language is used only to make clear the agency's right to refuse to turn the actual file over to the consumer; the language should not be used as an excuse to withhold information from the consumer.

The only information the Agency may withhold is medical information. FCRA § 1681g(a)(1).

71. FCRA § 1681g(a)(2). Sources consulted in the preparation of an "investigatory consumer report" need not be disclosed except pursuant to discovery procedures in an action brought under this Act.

72. FCRA § 1681g(a)(3).

73. FCRA § 1681h(a).

74. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,306 at 59,795 (1971).

75. Wall Street Journal, Dec. 29, 1971, at 1, col. 6 (Midwest ed.).

76. See note 48 *supra*.

E. INACCURATE AND DISPUTED INFORMATION

If a consumer disputes the accuracy or completeness of an item in his file, the consumer reporting agency must reinvestigate and record the current status of the information.⁷⁷ In most cases the investigation must be made immediately.⁷⁸ Should the information be found inaccurate or unverifiable it must be deleted from the consumer's file.⁷⁹ If reinvestigation does not resolve the dispute to the consumer's satisfaction, he may file a statement up to 100 words in length explaining the dispute.⁸⁰ Any subsequent reports must clearly note any disputed item and include the consumer's statement or an accurate summary of it.⁸¹ Finally, the agency is required to inform the consumer of his right, upon request, to have the amended report resubmitted to those who have used the erroneous report within the preceding six months, or the preceding two years if the report was for employment purposes.⁸²

These provisions should greatly aid the consumer denied credit or another benefit because of an inaccurate report. Using these procedures he can have the inaccuracy rectified and the corrected report recirculated to those who relied on the inaccurate version. The consumer's right to briefly explain a disputed item of information should prove especially valuable. Prior to the FCRA, unscrupulous merchants coerced payment for defective merchandise by threatening to report nonpayment to a credit bureau and thereby ruin the consumer's credit rating. This threat should be partially obviated by the consumer's right to add an explanation to his report citing legitimate reasons for nonpayment.

77. FCRA § 1681i(a). However, the agency need not reinvestigate if it has reason to believe the dispute is frivolous or irrelevant. *Id.*

78. The statute requires that the reinvestigation be within a "reasonable period." *Id.* The FTC has advised that it would be "appropriate" to begin the investigation immediately unless there is a good reason for delaying. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,306 at 59,795 (1971). ARIZ. REV. STAT. ANN. § 44-1946D (Supp. 1971) provides an incentive for the agencies to reinvestigate immediately. If the agency has not completed its investigation within 15 days of receiving a notice of inaccuracy, the agency must correct the item in its records as requested by the consumer and give notice of the correction to those who have previously received the uncorrected report.

79. FCRA § 1681i(a).

80. FCRA § 1681i(b).

81. FCRA § 1681i(c). This is not required if the agency has reasonable grounds to believe that the statement is frivolous or irrelevant. *Id.*

82. FCRA § 1681i(d).

F. PROTECTION FROM OBSOLETE INFORMATION

Except for a consumer's bankruptcy, which may be reported for 14 years, adverse information more than seven years old may not be used by a consumer reporting agency.⁸³ Additional protection from obsolete information is provided where adverse public record information is provided to a potential employer. In such a case, the reporting agency must either notify the consumer that public record information is being reported to the prospective employer or maintain strict procedures to verify the current status of the information.⁸⁴ Special procedures were considered necessary here for two reasons. First, it is difficult to adequately maintain the current status of public record information, and second, the nature of the employment decision is such that irreparable harm to a vital interest of the consumer may result from a denial of employment based on inaccurate information.⁸⁵

G. SPECIAL MEASURES FOR INVESTIGATIVE CONSUMER REPORTS

An investigative consumer report is a report in which information on the consumer's reputation, character and personal habits is obtained through personal interviews with friends, neighbors and others who have had some acquaintance with the subject of the report.⁸⁶ In the case of the ordinary consumer report, the consumer is notified of its existence only if he is adversely affected by its use.⁸⁷ However, where an investigative consumer report is concerned, the consumer has a right to notice that such a report is being prepared⁸⁸ and may request disclosure of the nature and scope of the intended investigation.⁸⁹ To further protect the subjects of such reports the FCRA requires that adverse information in an investigatory report may not be used in a subsequent report unless it has been reverified or has been on file no more than three months.⁹⁰

83. FCRA § 1681c(a)(1)-(6). These obligations to delete obsolete information do not apply where credit or life insurance in the amount of \$50,000 or more is concerned, or where an employment opportunity at a salary of more than \$20,000 a year is concerned. FCRA § 1681c(b)(1)-(3).

84. FCRA § 1681k(1)-(2).

85. See text accompanying notes 126-27 *infra*.

86. FCRA § 1681a(e).

87. FCRA § 1681m(a).

88. FCRA § 1681d(a)(1).

89. FCRA § 1681d(b).

90. FCRA § 1681l.

Such additional protection is necessary here because investigatory reports involve large-scale invasions of individual privacy. The individual faced with the prospect of such an investigation should have an opportunity to decide whether credit, insurance, or other benefits are sufficiently important to sacrifice his privacy. Notification that an investigation will be conducted gives the consumer an opportunity to decide if he wants to pay this price. If he does not, he can withdraw his application and there will be no investigation.⁹¹

It has been suggested that a system which forces the consumer either to forego credit or other benefits, or to accept a large-scale intrusion into his personal life is not ideal from the consumer's viewpoint.⁹² It is argued that restrictions are necessary on the areas of personal life that can be subjected to investigation for any of these purposes.⁹³ The feasibility of adding such restrictions to the FCRA is considered later.⁹⁴

H. SAFEGUARDING PRIVACY

Except in response to a court order or the subject's request, a consumer report may be furnished only to those intending to use it for credit, insurance or employment purposes, or in a determination of the consumer's eligibility for a government license, or for other legitimate business purposes.⁹⁵ Government agencies seeking access to consumer reports for reasons other than those listed may be furnished only the consumer's name, address, place of employment and former addresses and places of employment.⁹⁶ Consumer reporting agencies are required

91. The Act does not expressly require that the investigation cease if the consumer withdraws his application, but the party ordering the investigation will not want to pay for an unnecessary report. There is no incentive to continue the investigation just to have something in the files for future reference since adverse information in an investigatory report must be reverified prior to reuse. FCRA § 1681i. It would be economic folly to pay for information which might never be used and which would have to be reverified if it were used. In addition, the entire requirement of notification of the use of an investigatory report would be senseless if the consumer could not stop such a report by withdrawing his application. Ignoring a consumer's desire not to be the subject of such a report would be contrary to the Act's express concern for the consumer's right to privacy. FCRA § 1681(a)(4) and § 1681(b).

92. Note, *The Fair Credit Reporting Act*, 23 MAINE L. REV. 253, 261 (1971).

93. *Id.*

94. See Part IV A *infra*.

95. FCRA § 1681b.

96. FCRA § 1681f.

to maintain reasonable procedures designed to limit disclosure of consumer reports to the specified purposes.⁹⁷ Criminal penalties may be imposed for obtaining information from a consumer reporting agency under false pretenses⁹⁸ or for knowingly supplying information to unauthorized persons.⁹⁹

Other than for one of the specific purposes cited above, access to consumer files is limited to those having a "legitimate business need for the information in connection with a business transaction involving the consumer."¹⁰⁰ An FTC advisory opinion interprets this to mean that market researchers, attorneys investigating prospective jurors, and persons compiling blacklists and protective bulletins can no longer be granted access to consumer files.¹⁰¹ These individuals cannot show a "legitimate business need" because their need for information does not arise from a "business transaction involving the consumer." On the other hand, a person trying to collect a debt or trace an absconding debtor does have a need for information growing out of a "business transaction involving the consumer," and the FTC states that access to consumer reports should be granted to these individuals.¹⁰²

I. THE INJURED CONSUMER'S LEGAL REMEDIES

The FCRA creates a civil remedy for either willful or negligent noncompliance with the requirements of the Act.¹⁰³ In an action for willful noncompliance the consumer can recover punitive damages,¹⁰⁴ while recovery for negligent noncompliance is limited to actual damages.¹⁰⁵ Costs and reasonable attorney's fees will be allowed for both actions.¹⁰⁶ Actions under state law for defamation, invasion of privacy and negligence are still available to the consumer, but such actions may not be based on information disclosed in accordance with the requirements of the Act.¹⁰⁷ However, this grant of immunity does not apply where

97. FCRA § 1681e(a).

98. FCRA § 1681q.

99. FCRA § 1681r.

100. FCRA § 1681b(3)(E).

101. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,304 at 59,787 (1971).

102. *Id.* at 59,786.

103. FCRA § 1681n (willful noncompliance); FCRA § 1681o (negligent noncompliance).

104. FCRA § 1681n.

105. FCRA § 1681o.

106. FCRA § 1681n; FCRA § 1681o.

107. FCRA § 1681h(e).

false information is supplied with malice or willful intent to injure.¹⁰⁸

Since most consumer injuries will be the result of negligent rather than willful conduct, the injured consumer will usually rely on an action for negligent noncompliance to recover his losses. It would be appropriate for the court in such actions to place upon the defendant the burden of producing evidence relating to the negligence question.¹⁰⁹ The consumer reporting agency usually will be in control of this crucial evidence and the burden of production would have the effect of "smoking out" such evidence.¹¹⁰ Absent this procedural advantage, it is unlikely that actions for negligent noncompliance will be an effective remedy for injured consumers.

IV. EVALUATION OF THE FCRA AS A PROGRAM OF CONSUMER PROTECTION

The adequacy of the FCRA as a program of consumer protection must be measured by its effectiveness in solving the two major problems created by the consumer reporting industry: invasion of privacy and inaccurate reports.

A. THE ADEQUACY OF THE PRIVACY SAFEGUARDS

The FCRA's requirement that access to consumer reports be restricted to those who intend to use the reports for one of the purposes specified in the Act¹¹¹ should provide increased protection for the consumer's privacy.¹¹² However, the Act is deficient in that it fails to place restrictions on the kinds of information the consumer reporting agencies can gather and sell. It has been reported that for certain purposes the industry gathers information on such highly personal matters as the subject's hair style¹¹³ and whether he is living under a common

108. *Id.*

109. See Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFF. L. REV. 1 (1951).

110. *Id.* at 7, 9; see generally W. PROSSER, *THE LAW OF TORTS* 208-35 (4th ed. 1971). Cf. *Schroeder v. City & County Sav. Bank*, 293 N.Y. 370, 57 N.E.2d 842 (1944).

111. FCRA § 1681b.

112. For a criticism of the program see Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837, 866-67 (1971). See also Alschuler, *A Different View of Privacy*, 49 TEXAS L. REV. 872 (1971).

113. Wall Street Journal, Dec. 29, 1971, at 1, col. 6 (Midwest ed.).

law marriage.¹¹⁴ The industry also reports on the subject's political activities for certain purposes,¹¹⁵ a practice that could have a chilling effect on consumer participation in this constitutionally protected activity. Consumer spokesmen argued before Congressional committees that reporting such information is an unjustifiable invasion of privacy and proposed that the industry be restricted to reporting only information "reasonably relevant"¹¹⁶ to the purpose for which the report is to be used. Neither the proposed relevancy requirements nor any other restriction on kinds of information that can be reported was included in the FCRA.¹¹⁷ It is a fundamental weakness in the privacy program of the Act that it permits agencies to gather and report all kinds of information without regard to the impact of such activities on the individual's need for privacy or the chilling effect such activities may have on the exercise of constitutionally protected rights. A restriction should be added to the Act to deal with this problem, but it should probably not take the form of a relevancy requirement.

A relevancy requirement would not preclude agencies from gathering and reporting much of the information that critics of the industry believe should not be reported. Information concerning a person's private life is in many instances relevant to the purpose for which the report is sought. For example, automobile insurers have established that among the factors which indicate a higher than average loss potential for an individual are undesirable associates, poor morals, an antagonistic and antisocial temperament and living under a common law marriage arrangement.¹¹⁸ Since each of these factors is related to risk, a relevancy requirement would not bar the reporting of this highly personal information. Similarly, if merchants could prove that people involved in radical politics do not pay their bills, a relevancy requirement would not preclude the gathering and re-

114. *House Hearings*, *supra* note 2, at 516.

115. *Senate Hearings*, *supra* note 8, at 177-79.

116. This was the language of an alternative House Bill regulating the consumer reporting agencies. H.R. REP. NO. 16340, 91st Cong., 2d Sess. 54 (1970).

117. The Act states that its purpose is to require practices which are "fair and equitable to the consumer, with regard to the confidentiality, accuracy, *relevancy*, and proper utilization" of the information furnished by reporting agencies. FCRA § 1681(b) (emphasis added). However, no other provision in the Act mentions relevancy, and the FTC has issued an advisory opinion stating there is no restriction as to relevancy in the FCRA. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,313 at 59,806 (1971).

118. *House Hearings*, *supra* note 2, at 515-16.

porting of information on the political views of credit applicants. Perhaps some wholly nonessential information is being reported which a relevancy requirement could eliminate, but this would nevertheless be an inadequate safeguard considering the fundamental nature of an individual's right to privacy.

A more effective guaranty of consumer privacy would be an amendment prohibiting the reporting of certain information regardless of its relevance, such as information as to the subject's race, religion or political affiliations.¹¹⁹ Authority could be delegated to an administrative agency to expand the categories of prohibited information in accordance with a purpose of prohibiting commerce in information which is essentially private or is likely to have a chilling effect on constitutionally protected rights if reported. The fact that insurers, creditors or others find certain information useful in their decision-making process could be considered in determining whether to allow the agencies to report it. However, a finding that the information was useful should not be dispositive here, as it would be under a relevance test.

B. THE ADEQUACY OF THE PROGRAM TO PROTECT THE CONSUMER FROM INACCURATE REPORTS

The FCRA approach to protecting the consumer from inaccurate reports has been criticized for seeking to correct inaccurate information only after it has been reported rather than attempting to prevent the reporting of inaccurate information.¹²⁰ The Act's major mechanisms for dealing with inaccurate reports are remedial rather than preventive and begin to function only after the consumer has been harmed or inconvenienced by an inaccurate report.¹²¹ After an adverse decision on his application, notice is sent to the consumer.¹²² At this point, if the

119. A ban on gathering and reporting this type of information was proposed by the American Civil Liberties Union during the hearings in the House. *House Hearings*, *supra* note 2, at 231.

120. One commentator has described the approach as "monstrous": The credit reporting agencies succeeded in selling Congress the monstrous proposition that they should remain free to collect and disseminate erroneous dossiers—subject only to liability for malice or wilful intent to injure—and that the burden should fall upon their subjects to come forward and correct errors. Countryman, *supra* note 112, at 865.

121. The exception is the investigatory report which requires notice to the consumer prior to the commencement of the investigation. See text accompanying notes 86-91 *supra*.

122. FCRA § 1681m(a).

consumer discovers the error and so informs the agency, it is required to correct the report.¹²³ The Act then requires the corrected file to be resubmitted to the user¹²⁴ on the assumption that he will reverse his adverse decision upon receipt of the corrected report. Congress adopted a remedial rather than an effective preventive program because the latter was strongly opposed by the industry on the basis of its allegedly prohibitive cost.¹²⁵ Preventive measures tend to be expensive because they must be applied to all files and procedures. The cost advantage of the FCRA remedial program is that remedial action is necessary on only a small percentage of files.

If consumer reports involved only credit or insurance applications the Act's remedial approach to the problem of inaccurate reports would perhaps provide the consumer with sufficient protection. Presumably creditors and insurers solicit customers and will accept every satisfactory applicant. If a corrected report indicates that a consumer is in fact a good risk, a creditor or insurer would generally be willing to reverse a prior decision based upon an inaccurate report and grant the consumer the credit or insurance he desires. Thus, where insurance and credit are concerned, the remedial mechanisms of the FCRA should usually rectify any harm suffered by a consumer as a result of an inaccurate report.¹²⁶ However, if a consumer has lost an employment opportunity because of an inaccurate report, the remedial mechanisms of the Act would not seem to offer the consumer the same degree of protection. Unlike creditors or insurers, employers have limits on the number of qualified applicants they can accept at any time. Consequently, once an employment opportunity is lost, there is no assurance that it could

123. FCRA § 1681i(a).

124. FCRA § 1681i(d).

125. Discussions of cost were heard throughout the hearings. See, e.g., *House Hearings*, *supra* note 2, at 222, 227. Among the preventive measures that were strongly opposed by the industry because of their cost was a proposed requirement that all public record information be current as of seven days prior to the report (*id.* at 117), and a requirement that those parties who report past due accounts and collection problems also promptly report any changes in status of these accounts (*id.* at 119, 147).

126. There is a possibility of an additional loss that could not be remedied in these cases. As an example, in the interim period when the consumer is waiting for his file to be corrected, he could be forced to pay high risk insurance premiums and only when the report is corrected would he be able to buy insurance at average rates. The issue of compensation for these interim expenses was not raised in the committee hearings. However, such losses might be too small to be a source of concern.

be regained if a corrected report were submitted to the prospective employer. Thus, where pre-employment reports are concerned, additional preventive measures are necessary to minimize the possibility that employment decisions will be made on the basis of inaccurate information.

This need for stronger preventive measures where employment reports are concerned is recognized to a limited extent in the Act. As was indicated previously,¹²⁷ when public record information is furnished for employment purposes the agency must either notify the consumer that adverse public record information is being reported or it must maintain strict procedures to ensure that the information is complete and current.¹²⁸ However, this preventive program could be significantly improved. A simple and inexpensive preventive measure would be to require the submission of a copy of the pre-employment report to the subject for verification before the report is furnished to the employer.¹²⁹ Since the consumer rather than the agency would do the needed verification, the only expenses to the agency would be for copying, mailing and making corrections.¹³⁰ Since the reporting agencies are presently liable for correction expenses,¹³¹ this plan would simply advance the time when they are incurred. The cost of photocopying the report already prepared for the employer and mailing it to the consumer would be minimal. This extra preventive measure would increase the preparation time for pre-employment reports, but surely the consumer's vital interest in securing employment, which is dependent on the accuracy of such reports, outweighs this factor.

127. See text accompanying note 84 *supra*.

128. FCRA § 1681k(2).

129. OKLA. STAT. ANN. tit. 24, § 82 (1971) requires that a copy of a credit report be submitted to the consumer before it is furnished to a third party. The Oklahoma Attorney General has announced he intends to enforce this requirement although it is stricter than what is required by the FCRA. 4 CCH CONSUMER CREDIT GUIDE ¶ 99,257 (1972). State law is preempted by the FCRA only to the extent such law is inconsistent with the requirements of the FCRA. FCRA § 1681t. The Oklahoma Attorney General's position appears to be that statutes stricter than the FCRA are not inconsistent with it.

130. Agencies are allowed to withhold the sources of information in an investigative consumer report from the subject of the report. FCRA § 1681g(a)(2). If the agencies feel the need to excise the names of sources from the copy of the report to be sent to the subject under this plan, this would increase their costs, but such increase would not be significant.

131. FCRA § 1681j.

A preventive program similar to the foregoing could not appropriately be applied to credit reports since credit reporting is done largely by telephone or teletype, a practice that would be impossible if every report had to be cleared with the consumer prior to submission to the creditor. Also, credit is sought much more frequently than employment and thus notification costs could become prohibitive here.¹³² Given the additional factor that creditors want customers and would be willing to restore credit if a mistake were corrected, there is probably no need for a preventive program to be applied to credit reports. However, the reasons for not applying preventive measures to credit reports do not apply to pre-employment reports. Congress may not have appreciated the differing situations of a person refused credit on the basis of an inaccurate report and one refused employment. The potential for irreparable harm to a person denied employment is a persuasive reason for creating a preventive program to upgrade the quality of pre-employment reports.

V. CONCLUSION

The FCRA offers the consumer substantial protection. The consumer victimized by an inaccurate report or injured by an invasion of privacy is no longer without a remedy against the consumer reporting agency. However, restrictions should be imposed on the investigation and reporting of essentially private information and additional preventive measures should be required of those preparing pre-employment reports. If the Act were amended in these two respects, it would be a much more effective instrument for consumer protection.

¹³². However, this procedure is required in Oklahoma. See note 129 *supra*.